No. 15,134

IN THE

United States Court of Appeals

For the Ninth Circuit

MORRIS TRIEBER,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

On petition of the appellee, the Referee in Bankruptcy at San Francisco in the Northern District of California issued an order directed to the appellant requiring him to show cause why he should not be required to pay to the appellee, as trustee of the estate of the said bankrupt, the sum of $40,675.28 as compensatory and punitive damages for alleged fraud upon the bankrupt corporation.

For answer and return to the said order, the appellant moved to dismiss the petition and to discharge the order to show cause for want of jurisdiction. The Referee made what was styled "An Order, Judgment

and Decree'' overruling appellant's objection to his jurisdiction to make the turnover order. Appellant petitioned the District Court for a review of the Referee's order, which petition was denied by the District Court upon the ground that the order was interlocutory and not final. (TR 52.) This appeal is from the said order of the District Court.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction are as follows:

1. The jurisdiction of the District Court, Title 28, Sec. 1334, United States Code:

> ''The District Court shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy.''

2. The jurisdiction of this Court upon appeal to review the order in question: Title 11, Section 47, United States Code:

> *''Jurisdiction of Appellate Courts:*
>
> ''(a) The United States Courts of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse, both in matters of law and in matters of fact.''

3. The pleadings necessary to show the existence of jurisdiction.

(a) The proof of claim of appellant. (TR 4.)

(b) Trustee's objections to the allowance of claim of Morris Trieber and petition for turnover order. (TR 8.)

(c) Answer and return of Morris Trieber to order to show cause and motion to dismiss petition of Trustee and to discharge order to show cause for want of jurisdiction. (TR 20.)

(d) Petition of Morris Trieber for review of order of Referee by a Judge. (TR 44.)

4. The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree, or order in question.

These facts are set forth succinctly in the introductory paragraph of this brief and will be stated more fully in the ensuing abstract of the case. Accordingly, in the interest of brevity, and to avoid repetition, statement thereof is here omitted.

ABSTRACT OF THE CASE PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

Gayne Sales Co., Inc., a California Corporation, was adjudicated a bankrupt on August 24, 1954, and the proceeding was referred to the Referee in Bankruptcy. (TR 3.)

On October 15, 1954, Morris Trieber filed a proof of claim, setting forth that the bankrupt corporation was at the time of the filing of its petition and theretofore justly indebted to him in the sum of $3162.24, itemized as follows:

For salary for services performed for the corporation pursuant to an oral agreement, $1600.00; for money paid by claimant on a note owing by the bankrupt, which note claimant had guaranteed, and on which note claimant paid, $750.00; for goods, wares and merchandise sold and delivered to the bankrupt, $382.65; paid by claimant on behalf of bankrupt on a judgment rendered against the bankrupt, which judgment this claimant guarantees, $408.89; total $3141.54. (TR 4.)

It was further alleged that no part of the debt or liability had been paid.

On June 20, 1955, the trustee filed a document entitled, "Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turnover Order." (TR 8.)

This pleading, after denying the indebtedness, sets forth what is denominated: "A further, separate and distinct defense to the allowance of said claim, and as grounds for further relief." This contains the following allegations:

> "That from the inception of the said incorporation and during all of the times mentioned herein, the said Morris Trieber was one of the incorporators of the said corporation, and together with I. E. Arian, Jerome R. Gayne and Samuel Gayne,

was during all of the times herein referred to, a director of said corporation, and that the said Morris Trieber was at all times herein referred to an officer of said corporation, to wit, the secretary thereof.

"That heretofore and on or about the 8th day of March, 1951, at a meeting of the Board of Directors of said corporation, at which all of the directors aforenamed were present, and at which meeting the said Morris Trieber was present as director and as secretary of the said corporation, the said corporation adopted the following resolution (TR 10):

" 'Resolved, that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

" 'To I. E. Arian, for the transfer by him to this corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Spurplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars ($10,000.00), and to pay to him the sum of Twenty-five Hundred Dollars ($2500), which sum has already been paid.

" 'To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000)

par value, for the sum of Ten Thousand Dollars ($10,000) in cash.

" 'To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000) par value, for the transfer to this corporation of merchandise of the fair and reasonable value of $6,708.18, and the payment in cash of $3,291.82.

" 'To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars ($10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of $8,967.10 and payment in addition thereto of cash in the sum of $1,032.90.' (TR 11.)

"That said resolution was adopted upon the reliance of said Board of Directors upon the representations of the said Morris Trieber at that said meeting that he, the said Trieber, owned surplus merchandise of the kind and character which said corporation was organized to sell of the fair and reasonable market value of $15,675.28; that he, the said Morris Trieber, was indebted to Samuel Gayne, one of the directors of the said corporation, in the sum of $6,708.18; that he, the said Trieber, and Samuel Gayne had agreed between themselves that said indebtedness of Trieber to Gayne was to be paid by the said Trieber delivering to the said corporation on behalf of Gayne, merchandise of the reasonable value of $6,708.18 in partial payment of stock to be issued to Samuel Gayne by the said corporation upon approval by the Department of Investment, Division of Corporations of the State of California and that he, the said Trieber, would

in consideration of the said Samuel Gayne, I. E. Arian and Jerome Gayne, subscribing for $10,000 worth of stock to be paid for as follows:

"By I. E. Arian, by merchandise of the reasonable value of his $10,000.00 subscription;

"By Jerome Gayne, by the payment of cash for his $10,000.00 worth of stock;

"By Samuel Gayne, by the payment by Trieber in his behalf of merchandise of the value of $6,708.18, and cash in the sum of $3,291.82.

"That he, Trieber, would deliver to said corporation, in payment of his subscription, merchandise of the reasonable value of $8,967.10 and cash in the sum of $1,032.90.

"That said directors, relying upon said representations, and believing the same to be true, did adopt the resolution aforementioned. (TR 12.)

"That thereafter and on or about the 22nd day of March, 1951, in line with said resolution, and with the full knowledge and consent of the said Trieber, and believing the representations aforementioned of the said Trieber, and in reliance thereon, the officers and directors of said corportion filed an Application for Permit to Sell and Issue Stock, to wit, one hundred (100) shares to each of the persons heretofore named, for Ten Thousand Dollars ($10,000.00), which said stock was paid for as set forth in said resolution aforementioned.

"That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations, State of California, issued a permit for the issuance and the sale of four hundred (400) shares of stock to the said persons named, for the consideration set

forth in the resolution aforementioned; that said permit further provided that the stock shall be issued by the 28th day of September, 1951; that said permit further required the appointment of an escrow holder to be approved by the said Commissioner, which escrow holder was to hold the stock issued to the persons aforementioned until the further order of the said Commissioner of Corporations; that no further order of the said Commissioner of Corporations was thereafter made. (TR 13.)

"That thereafter the directors of said corporation, with the full knowledge and consent of the said Morris Trieber, and in reliance on the said representations of the said Trieber, and with the approval of the Commissioner of Corporations, named and designated one Joseph A. Brown, an attorney at law, as said escrow holder; that the resolution appointing the said Joseph A. Brown as said escrow holder was adopted at a special meeting duly and regularly held on the 29th day of March, 1951, and a certified copy thereof was duly filed with the Division of Corporations by the said Morris Trieber as secretary on the 4th day of April, 1951, and said escrow holder was approved by the Commissioner of Corporations on the 6th day of April, 1951.

"That thereafter the said Morris Trieber, on or about the 30th day of April, 1951, represented to the directors and officers of said corporation that he had delivered to the said corporation merchandise of the reasonable value of $15,675.28, being the merchandise hereinabove referred to and delivered to said corporation in payment of stock, as follows:

"$6,708.18 against the stock to be issued to Samuel Gayne;

"$8,967.10, in payment of the stock to be issued to Morris Trieber.

"That in reliance upon the said representations of the said Trieber, so made on or about April 30, 1951, and believing the same to be true, the said corporation, on the said 30th day of April, 1951, pursuant to the Permit aforementioned, issued one hundred (100) shares of stock to each of the following named persons, for which stock said persons paid, or in the instance of Morris Trieber and Samuel Gayne, allegedly paid, the consideration therefor (TR 14):

"I. E. Arian, 100 shares of the par value of $100.00 each, $10,000.00 paid for by the said I. E. Arian in merchandise of the reasonable value of $10,000;

"Jerome R. Gayne, 100 shares of the par value of $100.00 each, for $10,000.00 cash;

"Samuel Gayne, 100 shares of the par value of $100.00 each, in consideration of the alleged delivery to the said corporation in his behalf of merchandise of the reasonable value of $6,708.18, as represented to said corporation by the said Morris Trieber, was delivered by him to said corporation, and cash in the sum of $3,291.82;

"Morris Trieber, 100 shares of the par value of $100.00 each, in consideration of the alleged delivery to said corporation of merchandise of the reasonable value of $8,967.10, as was represented by said Trieber, was by him delivered to said corporation, and cash in the sum of $1,032.90.

"That certificates numbered 1, 2, 3 and 4, respectively, were issued to said parties and delivered to the escrow holder on the 12th day of July, 1951, on behalf of said parties respectively, which escrow holder in turn issued a receipt to each of said parties for his said shares, setting forth that he held said certificates for the said parties, and filed a copy thereof with the Commissioner of Corporations of the State of California. (TR 15.)

"That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time discovered that the representations of the said Trieber made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, and discovered that said Trieber did not own or control any surplus or other property which was of the value of $15,675.28, or of any value whatsoever, that but for said false and untrue representations, said directors would not have adopted the said resolution so adopted on said day, nor would they have taken the further steps hereinabove outlined as having been taken, before the Division of Corporations of the State of California; that within the three years last past, the said officers and directors of said corporation, for the first time, discovered that the representations of the said Morris Trieber made to the officers and directors of said corporation on or about the 30th day of April, 1951, to the effect that he had delivered to the said corporation merchandise of the fair and reasonable value of $15,675.28 in partial payment of the stock as

hereinabove alleged, for which stock was issued to him and Samuel Gayne, were in each and every instance false, fraudulent and untrue, and that the said Morris Trieber did not deliver any merchandise to the said corporation of any value whatsoever, either in payment of any stock issued to him, or in payment of the stock issued to the said Samuel Gayne as aforementioned, and that the said Morris Trieber falsely (TR 16), fraudulently and wilfully misrepresented to the said corporation the delivery of said merchandise. That the said officers and directors of the said corporation believed said representations to be true and relied thereon, and but for said relief and reliance, would not have issued the stock hereinabove referred to to the said Morris Trieber and/or Samuel Gayne.

"That by reason of the said Morris Trieber's false, fraudulent and wilful misrepresentations as hereinabove set forth, and the reliance thereon by the said corporation's directors and officers, the said corporation and the creditors of said corporation have been damaged in the sum of $15,975.28, plus interest at the rate of seven per cent (7%) per annum on said sum from the 7th day of April, 1951, to date.

"That in doing the things herein alleged, the said Trieber acted wilfully, maliciously and wantonly and has been guilty of oppression, fraud and malice and the said Trieber's acts were in direct violation of the Rules and Regulations and Laws applicable to the sale of corporate stock and the payment therefor, and by reason thereof caused said corporation embarrassment, caused said corporation to issue false and fraudulent statements

to creditors and bank, to the further damage of the said corporation in the sum of $10,000.00, and by reason of the foregoing, the said corporation demands (TR 17) exemplary and punitive damages against the said Morrie Trieber in the sum of $15,000.00.

"Wherefore, said Trustee prays that an Order be made and entered disallowing the claim of the said Morrie Trieber in the sum of $3,162.24, and the whole thereof, and that no allowance be made for any sum whatsoever on said claim, and for an Order disallowing said claim unless and until said claimant pays to said Trustee the sum of $40,675.28, together with interest at legal rate of $15,675.28 from April 30, 1951, forward, and that said claimant be ordered to pay said sum to the Trustee herein, together with said Trustee's costs incurred herein, and for such further and different Order as may be just and proper in the premises." (TR 18.)

On the same day the referee issued an order that appellant appear before him on July 7, 1955 to show cause "why the relief prayed for by the trustee in said objections to the allowance of the claim of Morris Trieber should not be granted. (TR 19.)

On July 20, 1954, the appellant filed a document entitled, "Answer and return of Morris Trieber to order to show cause and motion to dismiss petition of trustee and to discharge order to show cause for want of jurisdiction." The grounds of motion to dismiss the order to show cause for want of jurisdiction are thus stated in the said answer and return (TR 20):

"I.

"That this Honorable Court has not, nor has your Honor as Referee in bankruptcy of said Honorable Court any jurisdiction to hear or determine the petition of said Referee which is annexed to the said order to show cause, or to make any order thereon or to grant any of the relief prayed for by the said Trustee; and in this behalf the said Morris Trieber further shows to your Honor that this proceeding presents a case of a contest between the Trustee in bankruptcy and a third person who is not a party to the bankruptcy proceeding and whose rights, claims and defense cannot be summarily adjudicated by your Honor or by this Honorable Court in this proceeding; and that it further appears that the aforesaid petition of said referee in bankruptcy is a purported claim against the said Morris Trieber for damages alleged to have been made by said Morris Trieber, and that it is further alleged in paragraph X of said petition that the said bankrupt corporation suffered adtional damages in the sum of $10,000; and that it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of $15,000; and the said Trustee in the *party* of the said petition prays for an order by your Honor that the said Morris Trieber pay to said Trustee the sum of $40,675.28 together with interest at legal rate on the sum of $15,675.28 from April 30, 1951, forward; that your Honor has no jurisdiction to make any such order, and that this Honorable Court has no jurisdiction to make any such order; that such an order or judgment could be

made only if a trial before a court of competent jurisdiction, and after a verdict of a jury duly empaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived; and in this behalf the said Morris Trieber further represents and shows to your Honor that this Honorable Court would in any event have no jurisdiction of any action brought by the said Trustee in bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, by reason of any alleged fraud, or otherwise, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Court of the State of California whose jurisdiction cannot be ousted by any order that your Honor might make.

"II.

"And for Further Answer and Return to the Said Order to Show Cause and as Further Ground for the Dismissal and Discharge of the Same and for Further Ground of Objection to the Jurisdiction of This Court to Hear and Determine Any of the Matters and Things Set Forth in the Aforesaid Petition of the Said Trustee in Bankruptcy, the Said Morris Trieber Alleges and Shows:

"That all and singular the matters and things set forth by the said trustee in bankruptcy as grounds for the order and relief sought herein by the said trustee, and all and singular the claims of the said trustee therein set forth cannot be maintained by said trustee in this proceeding for the reason that the said trustee is barred and

precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888 in which Gayne Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff and the said Morris Trieber was defendant in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding by the said Referee in bankruptcy, all of which from the said second amended complaint in the action last aforesaid, a copy of which is hereunto annexed as Exhibit 'A' and made a part hereof, fully and at large appears.

"That a copy of the Minute Order sustaining the said demurrer of the said Morris Trieber to the said complaint of the said Gayne Sales Co., Inc., a corporation, without leave to amend is hereunto annexed and made a part hereof in like manner and with like effect as if heretofore set forth in its entirety.

"And in this behalf the said Morris Trieber further shows to your Honor that thereafter and on the 11th day of August, 1954 the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the

State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation, the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeal of the State of California in and for the First Appellate District Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeal a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding by the said Referee in bankruptcy that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeal, a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

"That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeal and was argued by counsel; in consideration whereof it

was by the said District Court of Appeal, ordered, adjudged and decreed that the said motion be granted and that the said appeal of the said Gayne Sales Co., Inc. be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc. v. Morris Trieber, is res judicata as to all and singular the matters before your Honor and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said trustee in bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them or by either of them; and your Honor and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said trustee in bankruptcy.

"III.

"And for Further Answer and Return to the Said Order to Show Cause Said Morris Trieber Respectfully Shows to Your Honor:

"That the purported cause of action and each and every of the said purported causes of action and any and all matters and things whatsoever set forth herein by the said Trustee in bankruptcy are barred by the Statute of Limitations as set forth in Subdivision 4 in Section 338 of the Code of Civil Procedure of the State of California."

The prayer of the answer and return is that the order to show cause be dismissed and discharged, that the trustee take nothing thereby, and that it be held

and considered that the Court has no jurisdiction of the proceeding. (TR 26.)

Annexed to the answer is a copy of a second amended complaint filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and numbered therein 431,888 and entitled Gayne Sales Co., Inc., a corporation, v. Morris Trieber. (TR 26 *et seq.*)

On January 10, 1956, the referee made an order which, after certain preliminary recitals, reads as follows:

> "It hereby is ordered, adjudged and decreed:
>
> "1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;
>
> "2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;
>
> "3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m. of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant." (TR 43, 44.)

On January 13, 1956, the appellant filed in the District Court a petition for review of the said order of the referee by a judge. (TR 44, *et seq.*) This peti-

tion, after setting forth the order of the referee *in haec verba,* assigns seven errors in respect thereto.

The first of these is that neither the Court nor the referee had any jurisdiction to determine the petition of the trustee in bankruptcy, for the reason that the order sought to be reviewed was made in a case of a contest between the trustee in bankruptcy and Trieber, who was not a party to the bankruptcy proceedings, and whose rights, claims and defenses could not be summarily adjudicated by the referee or by the Court.

The second error assigned is that the petition of the referee in bankruptcy sets forth a purported claim for both compensatory and exemplary damages against Trieber, and prays for an order that Trieber pay and turn over to the trustee the sum of $40,675.28, together with interest at the legal rate in the sum of $15,675.28 from April 30, 1951 forward.

The third error assigned is that neither the Court nor the referee has any jurisdiction to make any such order; "that such an order or judgment could be made only upon a trial before a court of competent jurisdiction, and after verdict of a jury duly impaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived."

The fourth error assigned is that neither the Court nor the referee would have any jurisdiction over such an action, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction

of any such action is in the courts of the State of California.

The fifth and sixth grounds set forth the judgment of the State Court in Gayne Sales Co., Inc. v. Trieber, which Trieber's return describes in detail, and the dismissal of the bankrupt corporation's appeal by the District Court of Appeal of the State of California, as *res judicata.*

The seventh ground sets forth that the purported cause of action set forth in the petition of the trustee in bankruptcy against Trieber is barred by the Statute of Limitations of the State of California, as set forth in Subdivision 4 of Section 338 of the California Code of Civil Procedure.

The prayer of the petition is that the order of the referee be reviewed by one of the judges of the District Court, and that the petition of the trustee be dismissed and the order to show cause discharged. (TR 46-52.)

On April 11, 1956, the District Court made an order, which, after certain preliminary recitals, concludes as follows:

> "It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See Collier on Bankruptcy § 39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee." (TR 53.)

On April 16, 1956, Trieber appealed to this Court from the said order of the District Judge. (TR 54.)

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Judge erred in holding that the order of the referee here involved was interlocutory and not final, and therefore should not be reviewed.

2. This specification of error is fully set forth in Subdivision I of the Answer and Return of Morris Trieber to the order to show cause, and restatement of the same is hereby omitted in the interest of brevity. (TR 20.)

3. This specification is fully set forth in Subdivision II *(res judicata)* of the said answer and return, and the repetition of the same is here omitted, in the interest of brevity. (TR 22.)

4. This specification is set forth in Subdivision III (Statute of Limitations) of the answer and return of Morris Trieber to the order to show cause (TR 25), and is omitted here in the interest of brevity.

ARGUMENT OF THE CASE.

SUMMARY OF THE ARGUMENT.

The jurisdiction of this Court in bankruptcy matters extends to interlocutory as well as to final orders, and a review should he had in all cases where a substantial right is involved. The appellant should not be compelled to undergo the delay and expense of

a long hearing before the referee, if the bankruptcy court lacks jurisdiction to grant the demand of the trustee for damages, both compensatory and punitive, in a summary proceeding, thus denying appellant the constitutional right to a trial by jury. The return of the appellant to the order to show cause, which is not controverted, shows that the claim of fraud has already been adjudicated by the state Court in a controversy between appellant and the bankrupt corporation; and shows, moreover, that since the trustee stands in the position of the bankrupt, he is barred by the applicable statute of limitations of the State of California.

I.

THE APPELLATE JURISDICTION OF THIS COURT IN BANKRUPTCY PROCEEDINGS INCLUDES INTERLOCUTORY AS WELL AS FINAL ORDERS.

We discuss this subject at the outset because we anticipate a motion by the appellee to dismiss this appeal upon the ground that the order appealed from is an interlocutory and not a final order. We shall proceed to show that, under the plain provisions of the statute, the jurisdiction of this Court includes interlocutory orders in bankruptcy:

Section 47, Title 11, U.S.C.A., reads as follows:

> *"Jurisdiction of appellate courts.*
>
> "(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter

held, are invested with appellate jurisdiction from the several courts of bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact; *Provided, however,* that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

"(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

It would seem that this language is so clear that he who runs may read; yet its force and effect seem to have been lost sight of in decisions handed down since the amendment of 1938, which ignore that the distinction in the former statute between "proceedings" and "controversies" no longer exists, and that interlocutory as well as final orders are appealable, subject only to the rule that the order must not be of a purely formal or trivial character; in other words, the order must be one which affects substantial rights of the appellant.

Remington (Vol. 8, p. 323), under the heading, "Appealable Orders; in General", thus states the situation as it now exists with respect to appeals from orders in bankruptcy:

> "The original provisions of Sections 24-25 of the 1898 bankruptcy act were quite at variance from the present form. It contemplated possible use of a writ of error or of certiorari, as well as appeals in equity; were so phrased as to indicate a distinction between 'controversies arising in bankruptcy' and 'bankruptcy proceedings'; and the only expressly appealable orders were (1) a judgment adjudging bankruptcy, (2) a judgment granting or giving a discharge, and (3) a judgment allowing or rejecting a claim of $500 or more. To state that this left things in considerable doubt and uncertainty reflects polite restraint in the use of stronger terms. In certain respects, some of the older decisions still have value, but the majority of them, since the 1926 and 1938 amendment of the sections herein involved, are worthless. It can be said now that appeal lies from *any* order, either interlocutory or final, whether entered in a 'controversy arising in bankruptcy', or in a 'bankruptcy proceeding', by which the appellant is aggrieved. *There is no longer any doubt about the appealability of the various and sundry intermediate or interlocutory orders in the course of bankruptcy administration, provided they have actual significance.*"

The provisions of Section 24 of the Bankruptcy Act, as amended in 1938, 11 U.S.C. Sec. 47, in respect of the review by appeal of interlocutory orders in proceedings in bankruptcy, have been applied or in-

voked in the instances hereinafter noted in which the order in question was expressly characterized by the Court as such an order, or has been deemed to be such although not expressly so characterized, with the results stated.

In the following instances, in addition to the others subsequently noted, the order in question has been held or declared appealable, or an appeal therefrom has been entertained:

An order denying a motion by the debtor to dismiss an involuntary petition in bankruptcy (*Harris v. Mills Novelty Co.,* 106 Fed. 2d 976; *Theard v. Fidelity & Deposit Co.,* 202 Fed. 2d 880) or for the reorganization of a corporate debtor.

An order in a reorganization proceeding appointing a person other than a referee as a special master to take testimony and report as to the fairness and reasonableness of a proposed compromise offer, the Court having intimated that if such offer should be accepted and approved the debtor corporation would be returned to the stockholders and the proceeding would be dismissed.

An order of contempt for failure to produce books of account relating to the business of the bankrupt. (*Robertson v. Berger,* 102 Fed. 2d 530.)

An order denying the petition of the trustee for an order directing a witness to answer certain questions and produce certain memoranda in an examination under Section 21(a) of the Bankruptcy Act, 11 U.S.C. Sec. 44(a). (*Re Bush Terminal Co.,* 105 Fed. 2d 150.)

An order denying a motion of tax authorities for the dismissal of a petition of the debtor's trustee alleging that taxes assessed against the debtor were excessive and praying that the Court hear and determine the amount and legality of the taxes in question. (*Arkansas Corp. Commission v. Thompson,* 116 Fed. 2d 179, reversed on other grounds, 313 U.S. 132, 85 L. Ed. 1244, 61 S. Ct. 888.)

An order denying the motion of a creditor to withdraw a claim previously filed by it in the bankruptcy proceeding. (*Kelso v. Maclaren,* 122 Fed. 2d 867.)

An order denying the motion of a creditor, against whom a counterclaim had been filed by the trustee, for the dismissal of the counterclaim insofar as it exceeded the amount of the creditor's claim, on the ground that the Court was without jurisdiction of the creditor by reason of his nonresidence and the lack of service of process. (*Columbia Foundry Co. v. Lochner,* 179 Fed. 2d 630, 14 A.L.R. 2d 1349.)

An order in a reorganization proceeding refusing to recognize a state Court judgment obtained against the debtor on a claim for damages for a personal injury sustained after the institution of the proceeding as proof of such claim and remanding the claim to the master for hearing on the merits. (*Re Chicago & E. I. R. Co.,* 121 Fed. 2d 785, certiorari denied, 314 U.S. 653, 86 L. Ed. 523, 62 S. Ct. 102.)

An order requiring the referee to furnish to a creditor a transcript of testimony taken in an examination under Section 21a of the Bankruptcy Act. (*Re Winton Shirt Corp.,* 104 Fed. 2d 777.)

An order in a reorganization proceeding impounding the list of the debtor's creditors and stockholders and providing that use of the list for the purpose of sending communications to security holders should be permitted only separate applications to the Court to authorize specific communications. (*Delatour v. Meredith,* 144 Fed. 2d 594.)

An order approving an order of the referee instructing the trustee not to pay a sum required to extend the bankrupt's leasehold interest in property occupied by it. (*R. J. Rosen & Sons, Inc.,* 130 Fed. 2d 81.)

An order in a reorganization proceeding authorizing the sale by the trustee of certain real property alleged to belong to the debtor. (*Hoehn v. McIntosh,* 110 Fed. 2d 199.)

An order in a proceeding under Section 75 of the Bankruptcy Act, 11 U.S.C. Sec. 203, denying a motion of creditors of the debtor for leave to foreclose their mortgages. (*Federal Land Bank v. Hansen,* 113 Fed. 2d 82.)

An order denying the bankrupt's motion to complete the record upon the referee's refusal to transmit to the Court, on review of his order denying a discharge, copies of motion before referee to vacate his findings and documents attached thereto as exhibits. (*Re Leigh,* 139 Fed. 2d 386.)

An order affirming the action of the referee in sustaining the exceptions of the bankrupt to a portion of a creditor's specifications of objections to her

discharge, and overruling others. (*Morris Plan Industrial Bank v. Schorn,* 135 Fed. 2d 538.)

In the case of *In re Leigh,* 139 Fed. 2d 386, the referee in bankruptcy made findings indicating that he would deny the discharge of the bankrupt on the ground that he had failed to keep proper financial records. The bankrupt moved to vacate these findings, which motion was denied by the referee. The bankrupt then filed a timely petition for review of the order, and the referee refused to transmit to the District Court either a copy of the motion or copies of certain Court records which were attached to them. The bankrupt moved for a completion of the record in the District Court. This motion was denied and an appeal was taken to the United States Court of Appeals for the District of Columbia. At page 387, that Court, reversing the District Court, uses the following language:

> "Courts have refused appeals from interlocutory orders in bankruptcy which are trivial in their effect on the proceedings, but this is not the case here. A bankrupt who seeks a review of an order on a motion is entitled to have the court consider the motion papers and all the exhibits as they were presented to the referee, and this is a *substantial right.*"

The Court, while holding that the petitioner had misconceived his remedy in seeking a special appeal and that it must look to the Bankruptcy Act for its jurisdiction, states:

> *"That act authorizes an appeal of right from all bankruptcy orders, interlocutory as well as*

final, except where money alone is involved and the amount is less than $500."

The Court proceeds to state, however, that it would not be in the interest of justice to dismiss a special appeal merely to have it presented again in different form, and that it would "take jurisdiction of this case on the papers before us as an *appeal of right.*"

The limitation on the right to appeal from interlocutory orders is thus stated in *Federal Land Bank v. Hansen,* 113 Fed. 2d 82, by the Circuit Court of Appeals of the Second Circuit:

> "Appeals should be dismissed only when the court has no jurisdiction to review any aspect of the action taken below. When the order below is re-examined, even to the limited extent of determining whether or not the discretion of the District Court has been abused, the appellate court exercises its appellate jurisdiction, and affirmance or reversal would appear to be required. The present order was an interlocutory one. *Even in bankruptcy,* various interlocutory orders which determine nothing, such as orders merely of reference for report, are not reviewable and appeals will be accordingly dismissed. Other interlocutory orders are reviewable for abuse of discretion alone. Appeals from such orders have occasionally been dismissed, but we believe it is better practice to affirm if no abuse of discretion is shown (citing cases)."

We have emphasized the phrase "even in bankruptcy" in the foregoing quotation because it is obvious that the Court recognizes that, in contrast with

appeals generally, in which review is limited to final judgments or decrees, appeals in bankruptcy run from interlocutory orders. This, of course, is in conformity with the plain provisions of the statute as it now stands.

The case of *Pearson v. Higgins,* 34 Fed. 2d 27, in which the Circuit Court of Appeals of this Circuit held that an order of the District Court denying review of a referee's determination that the bankrupty Court had jurisdiction in a summary proceeding, was not an appealable order, is no longer the law, in view of the amendments to the sections of the Act relating to appeals.

It is remarkable that, on this circuit, as late as 1949 it was held that an interlocutory order in a "controversy" in bankruptcy, as distinguished from a "proceeding" in bankruptcy, was not appealable, despite the fact that subdivision (a) of Section 47 specifically authorizes appeals both in "controversies" and in "proceedings". It is quite obvious that the Court relied upon decisions prior to the amendment of 1938, and that the drastic and sweeping changes in the law were not called to the attention of the Court.

In *Goldie v. Carr,* 116 Fed. 2d 325, this Court dismissed an appeal from an order overruling defendant's objection to the jurisdiction of the bankruptcy Court to compel the appellant to turn over certain corporate shares and moneys alleged to be held in trust for the debtor's estate. The Court says that the order was plainly interlocutory in character and that no turnover order had been made. In regard

to the amendment of June 22, 1938, embodied in the Chandler Act, the Court says that Act—the controlling law here—does not make an interlocutory order in a controversy in bankruptcy appealable. This language directly contradicts the plain provisions of Section 47(a) itself, which makes interlocutory orders appealable whether made in a *controversy* in bankruptcy or in a *proceeding* in bankruptcy. It is submitted that this language must have been inadvertently used, and that the Court, in spite of its reference to the amendment, relied upon decisions prior to its adoption. This is clear from the fact that in support of the statement it cites *Pearson v. Higgins,* supra; *In re Federal Photo Engraving Corp.,* 54 Fed. 2d 628, and *Lieberman v. Bancroft,* 59 Fed. 2d 202, all of which were decided prior to the effective date of the 1938 amendment.

In *Arkansas Corporation Commission v. Thompson,* 116 Fed. 2d 179, in which the commission appealed from an interlocutory order denying its motion to dismiss a proceeding brought by the trustee, which alleged that the property of the railroad had been assessed in excess of its fair market value, the Circuit Court of Appeals of the Eighth Circuit says:

> "In limine the trustee has presented that this court should decline to maintain this appeal because the order appealed from is a proceeding in bankruptcy and is manifestly interlocutory and is not conclusive of the merits of the controversy between the trustee and the Arkansas tax authorities. But we conclude that the appeal is authorized by the provisions of Section 24,

Subdivisions a, b of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 854, 855, 11 U.S.C.A. Sec. 47, subs. a, b, and decline to dismiss it."

In *Cohen v. Eleven West 42d Street, Inc.,* 115 Fed. 2d 531, the Circuit Court of Appeals of the Second Circuit, reversing an order denying a motion for a summary judgment, says at page 533:

"The appellee suggests that the order, being interlocutory, is not appealable. In an action that would of course be true, for it merely refuses to dispose of the case without a trial (*In re Finkelstein,* 102 Fed. 2d 688; *Jones v. St. Paul F. & M. Ins. Co.,* 108 Fed. 2d 123, 125.) *But in bankruptcy, interlocutory orders are in general appealable.* (*Robertson v. Berger,* 102 Fed. 2d 530; *In re Winton Shirt Corp.,* 104 Fed. 2d 777.) And this was not an example of that class of orders which are *merely incidents* in an inquiry pending in the District Court (*In re Hotel Governor Clinton,* 107 Fed. 2d 398, 399)."

In *Columbia Foundry Co. v. Lochner,* 179 Fed. 2d 630, 14 A.L.R. 2d 1349, the law of appeals from interlocutory orders in bankruptcy is very aptly summarized by Judge Soper of the Fourth Circuit in the following language:

"It is urged upon us that this appeal should be dismissed as premature since it relates only to the jurisdiction of the court to render an affirmative judgment against the creditor and does not represent a final judgment in which the rights of the parties are determined. Section 24,

sub. a, 11 USCA Sec. 47, sub. a, of the Bankruptcy Act provides that the Circuit Courts of Appeals are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy. Since the appeal in the instant case is from an interlocutory order, it is premature unless it was entered in a proceeding in bankruptcy. Although the line of demarcation between proceedings and controversies is uncertain, it is generally accepted that questions between bankrupt and his creditors, such as is presented in the instant case, fall into the category of proceedings in bankruptcy. *Matter of National Finance & Mortgage Corp.,* 9 Cir., 96 F. 2d 74; *Broders v. Lage,* 8 Cir., 25 F. 2d 299; *Morehouse v. Pacific Hardware & Steel Co.,* 9 Cir., 177 F. 337; *Collier on Bankruptcy,* 14th Ed., Vol. 2, Sec. 24.12.

"The appeal under Section 24, sub. a, from an interlocutory order involving $500 or more in a proceeding in bankruptcy is generally one of right; but the decision limits the appeal to interlocutory orders which have the character of a formal exercise of judicial power affecting the asserted rights of a party and an appeal from an interlocutory order involving the exercise of the trial court's discretion is allowed only upon a showing of an abuse of discretion. See *Collier on Bankruptcy,* supra, Secs. 24.11, 24.39. Clearly due regard for the efficiency and dispatch of bankruptcy proceedings requires that the right of appeal from interlocutory orders under Section 24, sub. a, be kept within reasonable bounds.

"However, even prior to the enactment of Section 24, sub. a, an interlocutory order overruling an objection to jurisdiction had been held appealable. *In re Margolies,* 2 Cir., 266 F. 203; see *In re Hotel Governor Clinton, Inc.,* 2 Cir., 107 F. 2d 398, 399. It is our view that in consideration of the importance of the question involved, the appeal in this case should be entertained, and the motion to dismiss is therefore denied."

II.

NEITHER THE REFEREE NOR THE DISTRICT COURT IN BANKRUPTCY HAS ANY JURISDICTION TO MAKE THE ORDER SOUGHT BY THE TRUSTEE, OR TO HEAR OR DETERMINE HIS CLAIM FOR DAMAGES OR, MORE PARTICULARLY, TO MAKE THE "TURNOVER" ORDER PRAYED FOR.

1. A court of bankruptcy has no jurisdiction to try a controversy between the trustee and one not a party to the proceeding; and even the District Court may not, in the exercise of its law or equity jurisdiction, hear and determine such a suit in the absence of diversity of citizenship.

The law has been well settled for many years by well considered decisions of the Supreme Court of the United States that a referee in bankruptcy, and the District Court sitting in bankruptcy proceedings, have no jurisdiction to try title to property claimed adversely by one not a party to the bankruptcy proceedings. In other words, such a question of title cannot be summarily tried in the absence of the consent of the defendant, unless he appears in the bank-

ruptcy Court and consents to have his title tried in that manner.

> *Weidhorn v. Levy,* 253 U.S. 268, 40 S. Ct. 534; *Harris v. First National Bank,* 216 U.S. 382, 30 S. Ct. 296, 54 L. Ed. 528.

The jurisdictional point that we make is not merely that the referee in bankruptcy has no jurisdiction to try and determine adverse claims in the *bankruptcy proceeding;* BUT

The Federal Court itself would have no jurisdiction over a suit (which formerly would have been on the equity side) brought by the trustee to recover property claimed to belong to the bankrupt, or over any suit to recover damages *ex contractu* or *ex delicto* against a third party who denied the claim, in the absence of a showing of diversity of citizenship.

We may add that the language used in some of the decisions as to consent is seriously questionable, because of the universal rule that *the party cannot, by consent,* give a Court, as such, jurisdiction in a matter which is excluded by the laws of the land.

Thus in *Kaigler v. Gibson,* 264 Fed. 240, it is said that

> "*a trustee cannot sue in a Federal Court where there is no diversity of citizenship and no Federal question,* unless he brings the case within one of the exceptions."

It is also added:

> "It may be doubted whether the consent of the defendant mentioned above (referring to a sec-

> tion of the Bankruptcy Act) extends further than to a question of venue, which may be waived. As a general rule, Federal jurisdiction, properly so-called, cannot be so conferred. *Minnesota v. Northern Securities Co.,* 194 U.S. 43."

And the Supreme Court in *Lovell v. Newman,* 227 U.S. 412, 33 S. Ct. 375, says that the consent provided for in the Act

> "certainly was not intended to enlarge the jurisdiction of the circuit courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the constitution or laws of the United States."

In any event, the entire question of jurisdiction was set at rest as long ago as January 14, 1929, in a brief *per curiam* decision by the Supreme Court of the United States in *State Trust & Savings Bank v. Dunne,* 278 U.S. 582, 73 L. Ed. 518, 49 S. Ct. 184.

To understand that decision it is necessary to examine the opinion of the Circuit Court of Appeals in the same case (24 Fed. 2d 477). A trustee in bankruptcy, to use the language of the Circuit Court of Appeals for the Fifth Circuit,

> "brought suit to recover certain collaterals, alleging title to the same to be in him as trustee, and also averring that they had been transferred by the bankrupt within four months prior to the filing of the petition with intent and purpose on its part to hinder, delay and defraud its creditors in violation of the provisions of Section 67e of

the Bankrupt Act. In the alternative the bill prayed for an accounting and for recovery of the value of the collaterals, less any amount found to be due appellant."

The District Court rendered a decree or judgment in favor of the plaintiff, and this was affirmed by the Circuit Court of Appeals, which said in part:

> "It is contended by appellant that the District Court was without jurisdiction. The allegations of the bill were sufficient to show a cause of action arising under Section 67e of the Bankruptcy Act. We must put aside consideration of the merits as to that part of the bill, not as being without substance, but as unnecessary to be decided. The asserted ground of jurisdiction required the District Court to take jurisdiction initially and have done so, to decide the equities of the case."

A petition for a writ of certiorari was filed with the Supreme Court of the United States, and on January 14, 1929, the Court said:

> "*Per curiam:* Reversed, for the reason that there is no Federal jurisdiction over the cause. (*Wood v. A. Wilbert's Shingle & Lumber Co.,* 226 U.S. 384, 57 L. Ed. 264, 33 S. Ct. Rep. 125; *Weidhorn v. Levy,* 253 U.S. 268, 64 L. Ed. 898, 40 S. Ct. Rep. 534, *Taubel-Scott-Kitzmiller Co., v. Fox,* 264 U.S. 426, 68 L. Ed. 770, 44 S. Ct. Rep. 396.)"

2. Neither the referee nor the District Court has any jurisdiction to make the "turn-over" order sought by the trustee.

The effect of this order would not merely mean that a summary judgment would be rendered against Trie-

ber without a trial, by jury or otherwise, but also that he would be ordered to pay the entire amount claimed as damages by the trustee, and that if he refused to do so he could be attached and punished for contempt of Court, and ordered to stand committed until he paid to the trustee all the alleged compensatory and punitive damages, before the suit was ever tried.

This, as we heretofore stated, is indeed something novel in the law. It harks back to the horrors of debtors' prison and the infamies of the Wardens of the Fleet, described so vividly by the Earl of Birkenhead in his work on "Celebrated Criminal Trials."

The vice of the attempt in the case at bar is clearly pointed out by Justice McReynolds in *Daniel v. Guaranty Trust Co. of New York,* 285 U.S. 154, 52 S. Ct. 326, 78 L. Ed. 675:

> "In the circumstances, did the referee have jurisdiction to enter the turnover order against the Trust Company? The answer must be 'No' unless that company, by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.
>
> "In practice, such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a

> plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful."

It is, indeed, something new to ask a court to order a litigant, under the pains and penalties of contempt, to pay both compensatory and punitive damages to his adversary.

We again submit that neither the Referee nor the Court can make any such order.

> "Jurisdiction in summary proceedings, being of statutory authority, and based upon necessity to prevent threatened loss to the rightful owners of property, or defiant disobedience to the orders and decrees of courts, should not be enlarged by construction or implication."
>
> *In re Cox-Rackley Co.,* 245 Fed. 376.

We shall proceed to show that the order sought by the trustee will issue only in cases in which the adverse party is actually in the possession of property belonging to the bankrupt estate, or where the summary process is used "to recover possession of property which has been in the court's possession and has been wrongfully taken away."

Chandler v. Perry, 74 Fed. 2d 371.

In *Maggio v. Zeitz,* 333 U.S. 56, 68 S. Ct. 401, 92 L. Ed. 476, the Supreme Court unanimously reversed a commitment for contempt of court for failure to comply with a "turn over" order which had been affirmed by the Circuit Court of Appeals. (157 Fed. 2d 951.)

At 68 S.Ct. 405, Mr. Justice Jackson, who delivered the opinion of the majority of the Court, says of a "turnover" order:

> "But this procedure is one primarily *to get at property rather than to get at a debtor.* Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession —detinue for the unlawful detention of chattels and replevin for their unlawful taking—as distinguished from actions in trespass or trover *to recover damages* for the withholding or for the value of the property. Of course the modern remedy does not follow any of these ancient and often overlapping procedures, but the object—*possession of specific property*—is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for *restitution* rather than indemnification, with some characteristics of a proceeding in rem; the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for *damages* for tortious conduct such as embezzlement, misappropriations, or improvident dissipation of assets."

In no other case is the injustice and absurdity of such proceedings as the one at bar stated more forcibly than by the Circuit Court of Appeals of the Second Circuit in the case of *In re Luma Camera Service,* 157 Fed. 2d 951:

> *"We would hold that a turn over proceeding may not, via a fiction be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.* We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he later is indicted for violation of 11 U.S.C.A. Section 52, sub. b, his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute." (Italics by the Court.)

In *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155, 89 L. Ed. 97, it is said at page 155 of 65 S. Ct.:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' "

In support of this statement, Justice Frankfurter cites *Galbraith v. Vallely,* 256 U.S. 46, 41 S. Ct. 415, 65 L. Ed. 823 and *Taubel-Scott-Kitzmiller Co. v. Fox,* supra.

It is further held that:

> "Consent (to proceed summarily) is wanting where the claimant has throughout resisted the petition for a turn over order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a formal order."

We further call the attention of the Court to the very learned and exhaustive opinion of Judge Sanborn of the Eighth Circuit in the case of *In re Rathman,* 183 Fed. 913, which has often been cited with approval, it having been said in a later decision that "Judge Sanborn reviews all of the decisions and discusses exhaustively the cases in which a summary proceeding may be resorted to." (*In re Cox-Rackley Co.,* 245 Fed. 367.)

Space forbids lengthy quotations from the *Rathman* case. It is sufficient to say that he prefaces his discussion with the statement that the trustee may not escape "from the declarations of the Supreme Court that the jurisdiction of the Bankruptcy Court summarily to determine claims to lien upon and title to property claimed as that of the bankrupt arises out of its actual possession of the property, (citing cases) and is exclusive of all other grounds because the actual possession draws to it the legal custody of the property (etc.)".

An outstanding decision which specifically holds that money or the property of the bankrupt estate, not in the actual or constructive possession or control of the trustee, are not subject to the summary juris-

diction of the bankruptcy Court, and cannot be recovered by a "turn over" order, is *In re Joslyn's Estate,* 168 Fed. 2d 803, in which the Circuit Court of Appeals for the Seventh Circuit says, at page 806:

> "The law is well established that a Bankruptcy Court does not have summary jurisdiction over a turnover proceeding to recover an alleged indebtedness due from a third party to the bankrupt estate, or on property rights claimed by an adverse party who is in possession and makes timely objections to the summary jurisdiction."

In *Dwyer v. Franklin,* 227 Fed. 2d 152, decided January 2, 1956, the Court of Appeals of the Seventh Circuit, holds (We quote the syllabi in the Federal Reporter in lieu of quotation from the decision itself):

> "1. Though filing a claim in Bankruptcy Court is an implied consent to summary adjudication by that court of any counter-claims based upon the subject matter of that claim, it is not an implied consent to summary adjudication in Bankruptcy Court of a counterclaim arising out of subject matter which has no relation to that claim. Bankr. Act. Paras. 2, sub.a(7), 23, subs. a, b, 60, 70 and sub. e, 11 U.S.C.A., Paras. 11, sub.a(7) 46, subs. a, b, 96, 107, 110 and sub. e.
>
> 2. Where former director of bankrupt corporation filed claim for goods sold bankrupt, and trustees asserted counterclaim based on breach of claimant's fiduciary duty as director, bankruptcy court did not have jurisdiction to determine counterclaim in absence of consent of claimant which could not be implied from filing of

claim. Bankr. Act. Paras 2, subd. a(7) 23, subs. a, b, 60, 67, 70 and sub. e, 101-276, 301-399, 11 U.S.C.A. Paras. 11, sub. a(7), 46, subs. a, b, 96, 107, 110 and sub. e, 501-676, 701-799.

3. Trustees' unliquidated claim for damages against creditor, and creditors' claim against bankrupt for goods sold were not 'mutual debts', within provision of Bankruptcy Act authorizing the setoff of mutual debts. Bankr. Act. Para. 68, sub. a, 11 U.S.C.A. Para. 108 sub. a.

4. The phrase 'account stated' in provision of Bankruptcy Act authorizing the setoff of mutual debts between a creditor and a bankrupt means an agreement between the parties to an account based upon prior transactions between them, and does not authorize trustee to setoff or counterclaim an unrelated, unliquidated claim for damages against creditor's claim for goods sold and delivered to bankrupt. Bankr. Act, Sec. 68, sub. a, 11 U.S.C.A. Sec. 108, sub. a."

III.

THE PURPORTED CLAIM FOR AFFIRMATIVE RELIEF BY THE TRUSTEE IS BARRED BY THE STATUTE OF LIMITATIONS.

The separate defense of the trustee, shows upon its face that the alleged fraudulent representations alleged to have been made by Morris Trieber to the officers and directors of the bankrupt corporation were made on April 30, 1951, and that the stock certificates alleged to have been issued to Trieber and others were issued on the same day. The trustee's so-called "Separate and Distinct Defense," which is in reality in the nature of a cross complaint, was not filed until June

20, 1955, or more than four years after the date on which the fraud was alleged to have been committed and consummated.

Thus, the claim of the referee for affirmative relief is clearly barred by the statute of limitations unless the party who alleges the fraud has pleaded himself out of the statute by a proper allegation of nondiscovery. The only attempt made by the referee in that behalf is in paragraph IX of the Separate Defense and is as follows:

> "That thereafter and within three years last past, the officers and directors of said corporation, other than the said Trieber, for the first time discovered that the representations of the said Trieber, made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, etc."

There is no allegation anywhere in this pleading of the facts and circumstances which led to the discovery, or why the discovery was not made sooner, or that the discovery could not have been made within the statutory period by the exercise of reasonable diligence on the part of the corporation or its officers.

The naked allegation that fraud was not discovered until within three years prior to the filing of the suit has been held utterly insufficient in a long line of California cases.

Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775;
Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 Pac. 809;

Wilmans v. Weissman, 38 C.A. 693, 102 Pac. 2d 382;

Vertex Investment Company v. Schwabacher, 57 C.A. 2d 406, 134 Pac. 2d 891;

West v. Great Western Power Co., 36 C.A. 2d 403, 97 Pac. 2d 1014.

A complaint alleging only that the falsity of representations was not discovered until a certain date was insufficient.

Sacramento Suburban Fruit Lands Co. v. Lindquist, 39 Fed. 2d 900 (Certiorari denied by the Supreme Court of the United States, 282 U.S. 853, 51 S. Ct. 31, 75 L. Ed. 756.)

See to the same effect:

Sides v. Sides, 119 C.A. 2d 349, 259 Pac. 2d 708;

Cragge v. White, 113 C.A. 2d 356, 248 Pac. 2d 193;

Lewis v. Security-First National Bank of Los Angeles, 58 C.A. 2d 827, 137 Pac. 2d 864;

Seeger v. Odell, 18 Cal. 2d 409, 115 Pac. 2d 977, 136 A.L.R. 1291;

Jackson v. Master Holding Corp. 16 Cal. 2d 824, 108 Pac. 2d 673;

Gibson v. Rath, 13 C.A. 2d 40, 55 Pac. 2d 1219.

It would be like carrying coals to Newcastle to cite further decisions in support of a rule so long and so well settled. The allegation of the trustee's claim heretofore quoted is wholly insufficient to avoid the bar of the statute of limitations and, accordingly, the referee obviously had no jurisdiction to proceed to hear and determine a claim outlawed upon its face.

IV.

THE PROCEEDINGS BY THE TRUSTEE ARE BARRED BY THE FINAL JUDGMENT OF THE STATE COURT IN AN ACTION BETWEEN THE BANKRUPT AND TRIEBER WHICH WAS AN ACTION BETWEEN THE SAME PARTIES FOR THE SAME CAUSE.

The complaint filed in the action in the state Court is set forth *in haec verba* as an exhibit to the return of Trieber to the order to show cause. (TR 26-41.)

The separate defense of the trustee, claiming damages and demanding the turnover of $40,675.28 to the trustee appears at pages 9 to 18 of the Transcript.

Let us consider, at the outset, the allegations of the two pleadings as they stand side by side.

Paragraphs I and II of each set forth the corporate capacity of the bankrupt corporation, Gayne Sales Co., Inc. and the fact that it was originally organized as Arian Gayne and Associates.

Paragraph III sets forth the names of the incorporators, to wit, I. E. Arian, Jerome R. Gayne and Samuel Gayne, and states that at all the times referred to the incorporators were directors of the corporation and that Trieber was also a director.

Paragraph IV of the Trustee's defense is identical with Paragraph VI of the Second Amended Complaint. The only distinction between the two documents at this juncture is in the order in which they are set forth.

The resolution referred to in Paragraph VI of the Second Amended Complaint is preceded by allegations as to certain representations alleged to have been made

by Trieber at the meeting at which the resolution was adopted; whereas in the trustee's defense, the alleged representations are set forth after the resolution.

To state the matter otherwise,—in one pleading it is set forth that the directors of the corporation adopted a resolution and that the resolution was adopted because of alleged representations made by Trieber, in the other, it is alleged that Trieber made the representations and that the resolution was adopted in reliance thereon. They certainly stand not upon the order of their going.

Paragraph VI of the trustee's defense and paragraph VII of the complaint both recite the filing of an application for the issuance of 400 shares with the Commissioner of Corporations and Paragraphs VII of the trustee's defense and paragraph VIII of the second amended complaint each recite the approval of the application by the Commissioner.

We may add that Paragraph VII of the defense and Paragraph IX of the second amended complaint each contains allegations that Joseph A. Brown was appointed escrow holder for all of the stock to be issued by the corporation and that this appointment was approved by the Commissioner.

In Paragraph VIII of the first and Paragraph X of the second pleading, there are recitals that on or about the 30th day of April Trieber represented to the directors and officers of the corporation that he had delivered to the said corporation merchandise of a reasonable value of $15,675.28, $6,708.18 against the stock

to be issued to Samuel Gayne, and $8,967.10 in payment of the stock to be issued to Morris Trieber and that in reliance upon the said representations the corporation issued certain shares of stock to the persons therein named. The numbers of these certificates are set forth in each of the pleadings.

In Paragraph IX of the defense and Paragraph XI of the complaint, there are allegations to the effect that the representations made by Trieber were false, fraudulent and untrue and there is in the trustee's defense the naked allegations, repeatedly held to be insufficient (see *Lady Washington Consolidated Gold Mining Co. v. Wood,* 113 Cal. 482; *Galusha v. Fraser,* 178 Cal. 653; *Original Mining and Milling Co. v. Casad,* 210 Cal. 71; *Mortimer v. Loynes,* 74 C.A. 2d 160, and other decisions heretofore cited), that the discovery of the falsity of the representations was made within three years prior to the commencement of the action. Then in each case follow allegations of actual and punitive damages.

How any factual distinction can be drawn between the allegations of the two pleadings beggars our comprehension.

The law is well settled in California that a judgment of dismissal on the sustaining of a demurrer is *res judicata* on the identical factual issues. This rule is stated in the quite recent case of *Keidatz v. Albany,* 39 Cal. 2d 826, 249 Pac. 2d 264. This has apparently been the law ever since *Robinson v. Howard,* 5 Cal. 429, decided in 1855, in which it is stated by Justice Heydenfeldt that a judgment upon demurrer is a bar to sub-

sequent action "when it determines the whole merit of the case," and the opinion proceeds to say:

> "Here the averment of the answer shows that the demurrer went to the validity of the contract which gave rise to the claim, and this averment is found to be true as alleged, by the judge at *nisi prius,* upon inspecting the record of the case."

The same rules are stated with extensive discussion of authorities in *Goodard v. Security Title Insurance and Guarantee Co.,* 14 Cal. 2d 47, commencing at page 51, in which it is stated that a judgment given after the sustaining of a general demurrer on a ground of substance may be deemed a judgment on the merits and conclusive in a subsequent suit.

In *Erganian v. Brightman,* 13 Cal. App. 2d 696, 57 Pac. 2d 971, the Court says at page 700:

> "A judgment upon an order sustaining a demurrer constitutes a trial on the merits when an issue of law raised by the demurrer is heard and ruled upon by the Court. If leave to amend is granted, it must be taken advantage of, and if it is not, a plaintiff finds himself in the same position as if a demurrer were sustained without leave to amend."

In the paragraph preceding this language the Court says:

> "And a judgment upon the sustaining of a demurrer to the complaint for failure to state a cause of action is a bar to a subsequent action setting up the same facts."

In *Freeze v. Salot,* 122 Cal. App. 2d 561, 266 Pac. 2d 140 (hearing denied by the Supreme Court), affirming

a judgment entered on an order sustaining a demurrer without leave to amend, the Court said that in determining the validity of a plea in *res judicata* the pertinent question is whether the issue decided in the prior adjudication was identical with the one presented in the action in question.

In the recent case of *Crowley v. Modern Faucet Manufacturing Co.,* 44 Cal. 2d 321, 282 Pac. 2d 33, the Supreme Court affirmed a judgment dismissing an action upon the ground that a prior judgment sustaining a demurrer without leave to amend was *res judicata* and that the plaintiff "was in fact seeking to relitigate the precise issue that was finally adjudicated against him in the former action," and thus that "the trial Court properly exercised its power to stop vexatious litigation, clearly without merit, and burdensome to the Courts as well as to defendants."

CONCLUSION.

It is respectfully submitted that the order appealed from should be reversed and the cause remanded to the District Court with directions to dismiss the proceedings instituted by the appellee, and to discharge the order to show cause issued by the Referee in Bankruptcy.

Dated, San Francisco, California,
August 10, 1956.

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